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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 331

ERVIN HOHENSEE,

Petitioner,

vs.

HILDA MANCHESTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioner, Ervin Hohensee, appearing for himself, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cause on April 9, 1954, denying the petition for allowance of an appeal from the judgment of the Municipal Court of Appeals for the District of Columbia, entered on January 29, 1954.

Opinions Below

The original trial finding (R. 110) of the Municipal Court for the District of Columbia was entered on March 17, 1953 (R. 117). The opinion of the Municipal Court of Appeals

for the District of Columbia, reversing with instructions to grant a new trial, is reported at 99 A. 2d 86, 81 W. L. R. 1271 (App. "B"). The memorandum opinion of the Municipal Court for the District of Columbia on the second trial was filed on October 15, 1953 (R. 30, 31). The opinion of the Municipal Court of Appeals for the District of Columbia, affirming the judgment below (R. 180), is reported at 102 A. 2d 461 (App. "D"). The order of the United States Court of Appeals for the District of Columbia Circuit denying the petition for allowance of an appeal was entered on April 9, 1954 (R. 196; App. "E").

Jurisdiction

The order of the United States Court of Appeals for the District of Columbia Circuit was entered on April 9, 1954 (R. 196; App. "E"). The jurisdiction of this Court is invoked under 28 U.S.C., secs. 1254 (1), 2101 (c).

Questions Presented

1. Can a landlord in possession of property maintain an action for possession where a tenant not in possession has made no attempt to regain possession and has made it clear that he does not want and will not seek to regain possession?

2. After the expiration of the Rent Control Law, can a tenant on a month-to-month basis get or execute a writ of restitution, where the tenant would be subject to eviction immediately or shortly after regaining possession?

3. In an action for possession by the landlord, where the tenant, prior to trial, has made a statement voluntarily surrendering possession, is the case moot?

4. Can a court rule that a statement by a tenant voluntarily surrendering possession does not decide the question of possession so as to make the matter moot, but at the same

time does decide the question of possession so as to justify a judgment for landlord?

5. In an action by landlord for possession, based solely on alleged nonpayment of rent, is a court justified in awarding judgment for the landlord, without any evidence on the question of rent default, but solely on the basis of a statement by tenant that, though consistently denying any default, he does not want and will not seek to regain possession?

6. In an action by landlord for possession based on alleged nonpayment of rent, may a court deny tenant a trial by jury?

Statutes Involved

1. Section 1254 of title 28 of the United States Code provides in pertinent part:

> Section 1254. Courts of appeals; certiorari; appeal; certified questions.
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> 1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *
>
> * * * * * * *

2. Section 2102 of title 28 of the United States Code provides in pertinent part:

> Section 2101. Supreme Court; time for appeal or certiorari; docketing; stay * * *
>
> * * * * * * *
>
> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days

after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

* * * * * * *

Statement

In the original action between these parties, the respondent, Hilda Manchester, herein referred to as landlord, in 1952 secured a judgment for possession against the petitioner, Ervin Hohensee, herein referred to as tenant, in the Municipal Court of the District of Columbia on the grounds that the premises in question were not being used as housing accommodations, but were used for commercial purposes. On appeal the Municipal Court of Appeals reversed with instructions to grant a new trial, which was not sought by landlord. (90 A. 2d 830; App. "A").

Landlord brought a second complaint for possession in January, 1953, this time alleging nonpayment of rent (R. 65). In the lower court judgment again was for landlord (R. 55). While the case was pending on the second appeal to the Municipal Court of Appeals (App. "B"), tenant was dispossessed and the landlord, without calling it to the attention of tenant or the court, executed a writ of restitution on July 2, 1953 (R. 49-50). On August 20, 1953, the Municipal Court of Appeals again reversed the judgment of the lower court with instructions to grant a new trial (R. 15; App. "B").

On September 16, 1953, Chief Judge Walsh of the Municipal Court for the District of Columbia denied tenant's request for a jury trial (R. 14). When this request was denied, petitioner did not, of course, proffer the payment required, since it would have been futile.

After a default judgment for the landlord, resulting from tenant's inability to appear on the date originally set, had

been vacated (R. 14), the case came on before Chief Judge Walsh of the Municipal Court on September 25, 1953 (R. 14). At that time, tenant argued a motion that the matter was moot, since the complaint was solely for possession, no claim for money judgment being included, and landlord was in possession and tenant could not get and keep possession in view of the expiration of the Rent Control Act (R. 14). This motion was denied (R. 14). After an informal discussion, the Chief Judge suggested that the tenant agree not to press any counterclaim for damages against landlord and landlord agree to drop the present suit and all claims against tenant. This proposal was agreed to by tenant and landlord's counsel, but landlord would not agree to it. The Chief Judge thereupon disqualified himself from proceeding in the case.

The case then came on for trial before Judge Beard on October 5, 1953 (R. 5). This trial was devoted almost exclusively to argument of tenant's motion to dismiss on the ground that the question was moot (R. 5-13). Landlord did not attempt to put in any affirmative evidence, and appellant had no chance to make a defense on the merits (R. 5-13). Judgment was for landlord and Judge Beard rendered a memorandum opinion to this effect (R. 30-31).

On this latest appeal, the Municipal Court of Appeals for the District of Columbia affirmed the judgment of the lower court (R. 180; App. "D"). In its decision of January 29, 1954, the Municipal Court of Appeals held that the case was not moot since landlord had regained possession under a judgment which was later reversed and tenant could still seek restitution of possession (R. 180; App. "D"). The court took no cognizance of the effect of the expiration of the Rent Control Law on tenant's right to restitution. The court held that tenant's statement, prior to trial, voluntarily surrendering possession, if any, did not make the matter moot, but had the effect of establishing the land-

lord's possession as a legal possession, and justified the Municipal Court's action in awarding the landlord judgment for possession (R. 180; App. "D"). As stated by the Municipal Court of Appeals in its decision, "without taking any evidence the [Municipal] court entered judgment for the landlord on the basis of the tenant's statements" (R. 180; App. "D"). Near the conclusion of its opinion the Municipal Court of Appeals states: "It is true that the suit commenced as one for possession for nonpayment of rent, but regardless of the ground the issue was the right of possession" (R. 180; App. "D").

Tenant's Motion for Rehearing or for Modification was denied by the Municipal Court of Appeals on February 12, 1954 (R. 194).

On March 11, 1954, the petitioner filed a petition for appeal in the United States Court of Appeals for the District of Columbia Circuit, which was denied by order entered April 9, 1954 (R. 196; App. "E").

Reasons for Granting the Writ

In the discussion of the six questions presented, it will be apparent that the United States Court of Appeals for the District of Columbia Circuit, in denying the petition for an appeal, approved a decision by a lower court which is in conflict with applicable decisions of this court and has sanctioned a decision which has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

1. Landlord's complaint for possession in this case did not include a claim for money judgment (R. 65). Tenant was dispossessed prior to reversal on appeal of the judgment of the lower court (R. 49-50). Tenant did not wish to regain possession, but did have a counterclaim which he wished to have adjudicated. Tenant had been told by the

court in the earlier action that the counterclaim could not be considered in the absence of a claim for money in the landlord's complaint. To get to the real issues, tenant moved to dismiss the complaint or force an amendment to include a claim for money, on the ground that the question of possession was moot (R. 9-13). Tenant stated in open court that he voluntarily surrendered any possession he had and that he would not prosecute any rights he had to reacquire possession (R. 9-10, 16; App. "C"). After such a statement by tenant in open court, the court should have dismissed the complaint or at least required landlord to amend it to include a claim for money on account of the alleged nonpayment.

2. In its opinion the Municipal Court of Appeals stated:

> Our reversal of the prior judgment placed the parties in their original positions. The fact that the landlord had obtained possession under a judgment which was later reversed did not alter the situation. A tenant who has been evicted under an erroneous judgment may on reversal of the judgment seek restitution of possession. (R. 180; App "D").

From a legal standpoint, if tenant had, after reversal, executed a writ of restitution, the parties might possibly have been restored to their original positions. In this connection, however, two points must be borne in mind: (1) tenant did not get or execute such a writ; and (2) it is very doubtful that such a writ would have been issued and even if issued, that it would suffice to keep tenant in possession. Tenant pointed out in his brief that he did not think he could reacquire possession, in view of the termination of the Rent Control Law and that even if he could regain possession, he would again be subject to almost immediate eviction, in view of the fact that tenant had a month-to-month lease and no longer had any protection under the

Rent Control Law (R. 184). Any right tenant had to reacquire possession was purely theoretical. In *United States* v. *Moore*, 340 U. S. 616, it was held that after expiration of the Rent Control Law, the only relief which a Court could grant a tenant was restitution of overcharges. The Municipal Court of Appeals for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit completely ignored these points and refused even to consider the question.

3. In its opinion the Municipal Court of Appeals for the District of Columbia refers to the fact that "the tenant moved before trial for a dismissal on the ground that the case was moot," (R. 180; App. "D") and that when the case was ready to proceed to trial the tenant renewed his motion, stating to the court: "I here and now state I am voluntarily surrendering possession which of course I do not have, and will not prosecute any rights I have to acquire possession, in order to clarify any possibility that the case is not moot." (R. 180; App. "D.") In the court's opinion, which is noticeably lacking in citations to judicial authority, the court refers to but one case, *Quick* v. *Paregol*, D.C. Mun. App., 68 A. 2d 211, 77 W.L.R. 1322. In the original appeal in that case, D. C. Mun. App., 61 A. 2d 407, 76 W.L.R. 1210, the appellant denied any voluntary surrender and the Municipal Court of Appeals for the District of Columbia, in reversing, held that the determination of fact must be made by the trial court in a new trial. In that decision, the court stated "A voluntary surrender of possession would make the case moot." In reversing again on the second appeal, the court to emphasize the point again stated: "A voluntary surrender of possession would make the case moot."

In the present case, tenant assumed that his failure to seek restitution of possession after the first reversal amounted to a voluntary surrender of possession. To avoid

any possibility of doubt, however, in arguing the motion for dismissal, before both trial judges, tenant made the unequivocal statement: "... I am voluntarily surrendering possession ... in order to clarify any possibility that the case is not moot" (R. 9-10, 16; App. "C"). Tenant's statement was, of course, motivated by the above-referred-to principle in *Quick* v. *Paregol, supra.* In this case, the Municipal Court of Appeals for the District of Columbia failed to adhere to the principle which that court itself laid down.

The lower court's decision that tenant's voluntary statement of surrender did not make the matter moot is in conflict with principles laid down by this Court in numerous cases. In *Doremus* v. *Board of Education,* 342 U. S. 429, which was a declaratory judgment action testing the constitutional validity of a New Jersey statute providing for Bible-reading in schools, the appellant child had graduated before the appeal was taken. This Court held the cause moot, stating (at p. 433):

> "this Court does not sit to decide arguments after events have put them to rest."

A case which seems even more closely parallel to the present case is *Gray* v. *Board of Trustees,* 342 U.S. 517. There in a suit to enjoin appellees from alleged violations of the Fourteenth Amendment in refusing to admit Negroes to the University of Tennessee, where counsel for appellees stated at the argument that appellants would be admitted as requested, this Court vacated the judgments below and directed the District Court to dismiss the action upon the ground that the cause was moot.

The law on this point seems to be as stated in 1 Corpus Juris Secundum, at pages 1012-13:

> "To invoke the jurisdiction of a court of justice, as to a cause or right of action, it is primarily essential that there be involved a real and existing controversy,

> calling for a present adjudication involving present rights, and that some relief be sought which may be granted, something further than a mere declaration of right."

Here the landlord already had physical possession and tenant before and during trial voluntarily surrendered any rights he had to reacquire possession so that the court could not award possession, which was the only relief sought by the landlord.

The present case seems to be covered by the following quotation from 1 Corpus Juris Secundum, at page 1017:

> "Questions raised in an action may become moot, as to such action, by reason of the conclusion reached and expressed by the court and although a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after commencement of the action, lost that essential character it becomes a moot case or question which will not be considered by the court, * * *"

The futility of the lower court's action in this case is apparent when read in the light of the following quotation from *State ex rel. Myers* v. *Shinnick,* (Mo.) 19 S.W. (2d) 676, 678:

> "If no relief can be granted, either because it appears that such relief has already been obtained or because the situation has so changed that the relief cannot be granted, the court will not go through the empty formality of determining whether or not the relief asked for might have been granted, if it had not already been granted or could have been granted but for changed conditions."

4. When tenant made his statement during the argument of the motion, he obviously wanted (1) to remove any doubt that this case was moot since there had been a "voluntary surrender", within the meaning of the rule announced

by the Municipal Court of Appeals for the District of Columbia in *Quick* v. *Paregol, supra;* and (2) to assure landlord and the court that he would not seek to regain possession. Tenant chose the best English words he knew to convey these ideas. The Municipal Court of Appeals for the District of Columbia, however, interpreted tenant's statement as follows:

> "The tenant's surrender in open court of his rights, if any, to possession had the effect of establishing the landlord's then possession as a legal possession, and we think the court was justified in awarding the landlord judgment for possession to finally settle this issue between the parties." (R. 180; App. "D")

The above-quoted summary certainly does not reflect the ideas tenant wished to convey. Tenant on several occasions stated that he was voluntarily surrendering possession, so that there would be no question as to the case being moot, and repeatedly refused to say that landlord was entitled to legal possession, since he interpreted such a statement as an admission as to the allegation of nonpayment of rent (R. 10-15; App. "C"). Yet the court seems to give the words by tenant the directly opposite meaning, saying they did not make the case moot but established appellee's possession as a legal possession (R. 180; App. "D"). It is difficult to see how such a conclusion can be reconciled with the facts.

Even if tenant's statement could have, as stated by the court, "had the effect of establishing the landlord's then possession as a legal possession," (R. 180; App "D") this would not seem to justify a judgment in favor of the landlord for possession, but rather a dismissal on the ground that the question was moot, since there would be no issue for the court to decide. Since, as stated by the court, there was no taking of evidence (R. 180; App "D"), landlord obviously could not have proven her case on the allegation

of nonpayment of rent. If, as stated in the court's opinion, tenant's statement established landlord's possession as a legal possession (R. 180; App. "D"), that settled it, and there was no chance for the trial court "to finally settle this issue between the parties".

In the opinion the court seems to contradict itself. Tenant made his statement, voluntarily surrendering possession and promising not to prosecute any right to acquire possession, *both prior to and during* the argument on the motion to dismiss on the ground the matter was moot. The court in its opinion states: "The case was not moot • • • Though the landlord had actual possession, the issue between the parties—the right to possession—remained undecided and the case was not moot." (R. 180; App. "D") It would appear that the court was thus saying that appellant's statement was of no consequence and did not decide anything. In the next paragraph, however, the court states: "The tenant's surrender in open court of his rights, if any, to possession had the effect of establishing the landlord's then possession as a legal possession and we think the court was justified in awarding the landlord judgment for possession to finally settle this issue between the parties." (R. 180; App. "D") The same statement which in one paragraph is of no consequence or effect seems to be, in the succeeding paragraph, suddenly determinative of the whole question. Tenant's statement either did or did not determine the right to possession. If it did, the matter was moot and the motion to dismiss should have been granted. If it did not, the question was never decided in the lower court and the judgment should have been reversed.

5. The Municipal Court of Appeals for the District of Columbia held that tenant's statement did not dispose of the matter because "Though the landlord had actual possession, the issue between the parties—the right to possession—remained undecided and the case was not moot."

(R. 180; App. "D") The landlord's claimed right to possession was based on alleged nonpayment of rent (R. 65). Reading the court's opinion one would presume that the case was not moot since this issue—the alleged nonpayment of rent—had to be decided, but there is no pretense made that this ever was resolved. The court explains this failure in the next-to-the-last sentence of its opinion by saying: "It is true that the suit commenced as one for possession for nonpayment of rent, but regardless of the ground, the issue was right of possession." (R. 180; App "D"). If this sentence means anything, it seems to mean that so long as the issue is clear, a court can render a judgment without deciding whether the grounds on which the action is based do or do not justify the relief sought.

The affirmance makes tenant liable for court costs, deprives him of any right to damages for the wrongful ejectment, and validates an ejectment which the Municipal Court of Appeals of the District of Columbia in the prior appeal said was clearly unlawful. Such results can hardly be justified on any grounds.

6. The Municipal Court of Appeals for the District of Columbia denied the tenant his right to a jury trial. (R. 14) Although petitioner asked for a jury trial Chief Judge Walsh of the Municipal Court denied this request on September 16, 1953, on the grounds that this right had been waived in the previous trial (R. 14). "According to the weight of authority, however, the rule is that, unless otherwise provided by statute, the waiver of a jury on one trial is expended by that trial and does not affect the right of either party to demand a jury on a second trial after the case is remanded from an appellate court or dismissed on motion." 50 C.J.S. 824. After petitioner's request was denied (R. 14), it would have been futile for tenant to make a formal demand for a jury trial as provided by the Rules of the Court, since such action would have been

pointless. "The failure to demand a jury does not waive the right to a jury trial where there is a sufficient excuse for the failure." 50 C.J.S. 805.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted. Moreover, since the decision below is so clearly contrary to the consistent rulings of this Court on the points in question, the Court might appropriately consider reversing the judgment of the court below without further briefs or argument.

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APPENDIX "A"

THE MUNICIPAL COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 1238

ERVIN HOHENSEE, *Appellant*,

v.

HILDA MANCHESTER, *Appellee*

Appeal from The Municipal Court for the District of Columbia, Civil Division

(Submitted July 16, 1952. Decided August 5, 1952)

Ervin Hohensee, pro se.

Jacob N. Halper and Milford F. Schwartz for appellee.

Before Cayton, Chief Judge, and Hood and Quinn, Associate Judges

HOOD, *Associate Judge:*

This is an appeal by a tenant from a judgment for possession in favor of his landlord. The basis of the suit was a notice to quit, it being alleged that the rented premises were not used as housing accommodations but were used for commercial purposes. If this were true, the premises were not subject to the District of Columbia Emergency Rent Act.[1] The defense, however, was that the premises were used as housing accommodations and therefore subject to the rent act. The very brief record on appeal[2] discloses that the premises, described as the entire top floor of a

[1] Code 1940, Supp. VII, 45-1601 *et seq.*

[2] Appellant attached to his brief three documents. Two of them purported to be copies of letters to him from appellee's attorney. The third purported to be copy of a statement filed by appellee with the Administrator of Rent Control. Appellant concedes that the last named paper was not offered in evidence below and the record does not indicate that the first two papers were offered in evidence. Consequently, we give no consideration to these papers.

Connecticut Avenue building, were rented to the tenant in 1948 and he has been in possession since that time. The lease provided that the premises should not be used for any purpose other than an office. The present landlord, to whom the lease was assigned sometime after its execution, testified that she did not learn that the premises were being used as housing accommodations until December 1951, approximately three months before suit was filed. The rental agent testified that he learned of the use as housing accommodations six months after the tenant took possession, but he never gave permission to the tenant for such use. The tenant testified that about six months after execution of the lease the rental agent gave him permission to live on the premises and that he had lived there continuously since then.

The trial court made no findings of fact but entered a general finding for the landlord. On the basis of the record before us, the trial court would not have been justified in finding that the premises were not used as housing accommodations. Nor could the trial court properly find that the landlord did not know of such use though it could have found that express consent to such use was not given. On the record we must assume that the trial court found in favor of the landlord on the basis that the premises were rented for use as an office and were therefore not subject to the rent act and that the actual use of the premises was not material. If this was the basis of the court's ruling it was erroneous. In *White* v. *Allan*, D. C. Mun. App., 70 A. 2d 252, 78 W. L. R. 317, this court ruled that the use of the premises determines whether the rent act applies and that actual use as housing accommodations governs the applicability of the rent act even though the lease indicates a different use intention. It was further held there that although a tenant may not at will commit his landlord to a use not intended by the landlord, nevertheless if the tenant, contrary to a lease provision, uses the premises for housing accommodations with the knowledge of the landlord who thereafter continues to accept rent, then the actual use is the determining factor and not the intent expressed in the lease.

Under the doctrine of *White* v. *Allan* it was error on the facts disclosed by the record here to find for the landlord. However, one feature of the case was not developed. The tenant testified that he lived in the premises, but did not testify that the entire premises were used by him solely for living quarters. His brief indicates that a part of the premises were used by him for office purposes. Where a rental unit has a dual character, housing and commercial, the question arises which use controls with respect to applicability of the rent act. We have touched on this subject in cases realing with severability of the commercial and housing portions of rented premises. See *Bellmore* v. *Baum*, D. C. Mun. App., 68 A. 2d 588, 78 W. L. R. 227; *Ridolfi* v. *Benton*, D. C. Mun. App., 58 A. 2d 723, 76 W. L. R. 446. No one contends that the premises here involved are severable and the record completely lacks any description of the premises, its space, the number of rooms, the facilities, etc. If a rental unit is used for both housing and commercial purposes and is not subject to severability, then either the commercial or housing use must be given precedence. Which is the predominant or controlling use is a question of fact. The ultimate question is whether the use as housing accommodations is the primary use or whether it is merely incidental to the commercial use. See our decision in *Weinstein* v. *Rodger Corp., Inc.*, D. C. Mun. App., —— A. 2d ——, —— W. L. R. —— (decided this date). See also the following cases under the Federal rent law: *West* v. *Conrad*, 9 Cir., 177 F. 2d 252, 182 F. 2d 255; *Skendzel* v. *Rose Manor Realty Co.*, D. C. E. D. Wis., 80 F. Supp. 619; *Woods* v. *Whitehouse*, D. C. W. D. N. Y., 83 F. Supp. 268; *Woods* v. *Graf*, D. C. N. D. N. Y., 84 F. Supp. 893; *Bonanno* v. *Bollo*, 72 R. I. 278, 50 A. 2d 621.

It is clear from the record that no evidence was introduced either to establish or refute the primary use of the premises for one purpose or the other. This issue will have to be determined on a new trial.

Reversed with instructions to grant a new trial.

APPENDIX "B"

THE MUNICIPAL COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 1355

ERVIN HOHENSEE, *Appellant*,

v.

HILDA MANCHESTER, Assignee of William H. Ross and Allan Saturn, *Appellee*

Appeal from the Municipal Court for the District of Columbia, Civil Division

(Submitted August 3, 1953. Decided August 20, 1953)

Ervin Hohensee, appellant, pro se.

Herman Miller for appellee.

Before Cayton, Chief Judge, and Hood and Quinn, Associate Judges

Per CURIAM:

A tenant appeals from a judgment for possession rendered against him for nonpayment of rent. Because the statement of proceedings and evidence, approved over the objections of the tenant, is so lacking in detail, we have examined the original file of the trial court. It appears that after both parties had testified, the court continued the case and requested the parties "to produce whatever records they had of rental payments." Thereafter affidavits were filed by the landlord and others on her behalf. Her affidavit stated in detail her claim as to what rent payments had been made and referred to her "book of original entry." The other affidavits stated that copies of letters attached to the affidavits were copies of letters mailed to the tenant. Sometime after the filing of these affidavits a finding was entered in favor of the landlord.

It thus appears that this case was tried partly on affidavits and we know of no authority for such procedure in the absence of consent of the parties. The record discloses no such consent.

Reversed with instructions to grant a new trial.

APPENDIX "C"

IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA, CIVIL DIVISION, LANDLORD AND TENANT BRANCH

L & T 296-53

HILDA MANCHESTER, ETC., *Plaintiff*,

v.

ERVIN HOHENSEE, *Defendant*

MEMORANDUM OPINION

This case comes on for trial with an interesting background. Plaintiff recovered judgment for possession against the defendant and defendant appealed. Pending appeal, however, defendant was unable to post a supersedeas bond and plaintiff had issued and executed upon a writ of restitution. Thereafter, the judgment for possession was reversed and the case now comes on for trial with the plaintiff in physical possession of the premises. Immediately prior to trial the defendant filed a motion to dismiss the case on the grounds it was moot, formally representing to the Court that he then voluntarily surrendered possession of the premises and that in the future he would make no additional effort to gain physical possession of the premises. This motion was heard and decided by the Chief Judge, who denied it. The ruling on the motion then became the law of the case with respect to whether the cause was moot, *Mayflower Hotel Stockholders Protective Committee* v. *Mayflower Hotel Corporation*, 89 U.S. App.

D.C. 171, 193 F. 2d 666, and cases there cited. In any event, upon examination there seems to be no doubt of its correctness. Whatever the defendant may now say, the fact is that the eviction which took place while the case was on appeal was consummated within a period during which the cause was being vigorously contested and despite the resistance of the defendant. In the case of *Quick* v. *Paregol,* 68 A. 2d 211, the Municipal Court of Appeals indicated quite clearly that when possession was obtained pursuant to a writ of restitution the surrender of the premises was not voluntary and the case was not moot. Again, in *Ancher* v. *Lamb,* 86 A. 2d 533, at page 534, the Municipal Court of Appeals said: "Appellee has moved to dismiss the appeal on the ground that he has recovered possession of the houses and that hence the appeal has become moot. We think the point in not well taken. There seems to be no question that defendant did not yield possession to plaintiff voluntarily. Had he done so the appeal would be moot."

To permit the defendant to characterize the dispossession which occurred at the precise moment he was attacking the judgment upon which it was premised as a voluntary surrender and by this means to avoid the conclusive effect of an adverse judgment would relegate the question of the propriety of the eviction forever limbo.

When the case was called for trial, the defendant renewed his motion, stating that he no longer had physical possession, that he did not desire physical possession and would in the future assert no right or claim to possession, admitting as well that he had been properly served notice to vacate the premises and that since the expiration of the Rent Act he was no longer entitled to the premises.

Thus, under the circumstances, the only question to be decided prior to summary disposition of the case is whether the issue before the Court is the right to possession at the time suit is filed or whether the issue is the right to possession at the time the judgment or finding is entered. Cases in the Municipal Court of Appeals, *Cosby* v. *Shumaker,* 34 A. 2d 27, and *Westchester Apartments, Inc.* v. *Keroes,* 32 A. 2d 869, seem dispositive of this question. In both of these cases enactment of the Rent Control Act cre-

ated a defense to the action for possession after such action had been filed. In both cases the Municipal Court of Appeals held that the right of possession was to be determined by the circumstances as they existed at the time judgment was rendered. Application of the principle of these two cases to the case at bar seems to make clear that while the issues posed by this case are still litigable, there is no longer a material or substantial question of fact to be determined by the Court.

On the authority of *McGovern* v. *Hitt*, 62 App. D.C. 33, 64 F. 2d 156, cert. den. 290 U.S. 637, *McNeill* v. *Nevius*, 88 U.S. App. D.C. 49, 187 F. 2d 81, and *Evans* v. *Prentice*, 79 A. 2d 396, a trial finding for the plaintiff is entered upon opening statement of the defendant.

(Signed) EDWARD A. BEARD,
Judge.

APPENDIX "D"

THE MUNICIPAL COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 1424

ERVIN HOHENSEE, *Appellant*,

v.

HILDA MANCHESTER, *Appellee*

Appeal from the Municipal Court for the District of Columbia, Civil Division

(Argued December 21, 1953. Decided January 29, 1954)

Ervin Hohensee, appellant, pro se.

Herman Miller, for appellee.

Before Cayton, Chief Judge, and Hood and Quinn, Associate Judges

HOOD, *Associate Judge:*

This case is here on appeal for the second time. Appellant was sued by his landlord for possession for nonpay-

ment of rent. The landlord obtained judgment and on the prior appeal we reversed because of certain irregularities in the trial.[3] At the second trial a rather unusual situation developed. It appeared that after judgment in the first trial a writ of restitution had been issued (the tenant had not given a supersedeas bond), the landlord had thereby obtained possession, and no effort had been made by the tenant to regain possession after reversal of the judgment. Because of these facts, the tenant moved before trial for a dismissal on the ground that the case was moot. His position, in his own words, was: "In view of the fact that the defendant does not now have, and for some time has not had, possession of the premises, and plaintiff now has, and for some time has had, possession of the premises, there is no basis for this action and the complaint should be dismissed or summary judgment rendered for the defendant." His motion was denied. When the case was ready to proceed to trial the tenant renewed his motion, stating to the court: "I here and now state I am voluntarily surrendering possession which of course I do not have, and will not prosecute any rights I have to acquire possession, in order to clarify any possibility that the case is not moot." When the court inquired if the tenant was willing to agree that the landlord "is formally entitled to legal possession," the tenant refused to agree, but finally stated that the only reason he did not believe the landlord was entitled to judgment was because she already had possession. Without taking any evidence the court entered judgment for the landlord on the basis of the tenant's statements. The tenant has appealed.

The substance of the tenant's argument on appeal is: (1) That the case should have been dismissed as moot, and (2) that it was error to enter judgment without first having the landlord present her case and giving the tenant an opportunity to present his defense.

The case was not moot. Our reversal of the prior judgment placed the parties in their original positions. The fact that the landlord had obtained possession under a

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[3] *Hohensee* v. *Manchester*, D. C. Mun. App., 99 A. 2d 86, 81 W. L. R. 1271.

judgment which was later reversed did not alter the situation. A tenant who has been evicted under an erroneous judgment may on reversal of the judgment seek restitution of possession.[4] Though the landlord had actual possession, the issue between the parties—the right to possession—remained undecided and the case was not moot.

Was the trial court correct in awarding judgment to the landlord on the basis of the tenant's statements and concessions and without the taking of evidence? The issue between the parties, as we have said, was the right to possession. The tenant stated in open court that he was voluntarily surrendering possession. Having been ousted by the landlord, the tenant had the right to accept such ouster as the termination of the tenancy. But the tenant was unwilling to unequivocally acknowledge the landlord's present right to possession. The tenant's surrender in open court of his rights, if any, to possession had the effect of establishing the landlord's then possession as a legal possession, and we think the court was justified in awarding the landlord judgment for possession to finally settle this issue between the parties. It is true that the suit commenced as one for possession for nonpayment of rent, but regardless of the ground the issue was the right of possession. Any remaining differences between the parties may be settled by other litigation if the parties so desire, but we think this phase of their differences was rightly settled by the trial court.

Affirmed.

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[4] *Quick* v. *Paregol*, D. C. Mun. App., 68 A. 2d 211, 77 W. L. R. 1322.

APPENDIX "E"

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, APRIL TERM, 1954

[Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Apr. 9, 1954. Joseph W. Stewart, Clerk.

No. 12,105

ERVIN HOHENSEE, *Appellant*,

v.

HILDA MANCHESTER, *Appellee*

Before Stephens, Chief Judge, and Edgerton, and Fahy, Circuit Judges

ORDER

This case came on for consideration on the petition for allowance of an appeal from the judgment of the Municipal Court of Appeals entered herein January 29, 1954, and was argued by petitioner, pro se, and by counsel for respondent.

Upon consideration whereof it is Ordered by the Court that the aforesaid petition for allowance of an appeal be, and it is hereby, denied.

Per Curiam.

Dated: April 9, 1954.

Enter: —— ——, Chief Judge.